In the Supreme Court of the United States

October Term, 1977
No. 77-794

Supreme Court, U. S.
FILED
FEB 27 1978
MICHAEL RODAK, JR., CLERK

RONALD R. SILVERTON,
Appellant,

v.

STATE OF CALIFORNIA,
Appellee.

APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

77-794

MOTION TO DISMISS OR AFFIRM

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October Term, 1977
No. 77-794

RONALD R. SILVERTON,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeal of the State of California on the ground that the appeal does not present a substantial federal question.

OPINION BELOW

Appellant's judgement of conviction was affirmed in part and reversed in part by the Court of Appeal of the State of California, Second Appellate District, Division Four, on July 15, 1977. Appellant's Petition for Writ of Habeas Corpus was concurrently denied. The opinion was

certified for publication. (Jurisdictional Statement, Appendix A.) Petitions for rehearing filed by appellant and appellee State of California were denied. (Appendix A.) On September 8, 1977, the California Supreme Court denied petitions for hearing filed by appellant and appellee State of California. The Supreme Court ordered that the opinion filed by the Court of Appeal not be published in the official reports. (Appendix B.)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether California Civil Code section 224p is unconstitutional as written or as applied to appellant on the grounds that it infringes constitutionally protected expression under the First and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

Appellant Ronald R. Silverton was convicted in Los Angeles County Superior Court of: (1) advertising for adoption without a license in violation of California Civil Code section 224p; (2) unlawful operation of a home-finding agency, in violation of California Health and Safety Code section 1310; [1] and (3) conspiracy to violate criminal laws in violation of California Penal Code section 182(1). (CT pp. 938-945, 1017.)

[1] Health & Saf. Code, § 1310, added by Stats. 1972, ch. 1148, § 3, p. 2226, and repealed by Stats. 1973, ch. 1202, § 1, p. 2564.

Appellant was sentenced to county jail for consecutive terms of six months and five months as to the convictions for violation of California Civil Code section 224p and California Health and Safety Code section 1310, respectively. As to the conviction for violation of California Penal Code section 182(1), appellant was granted probation for 3 years on condition that he serve 11 months in county jail concurrently with the sentence imposed on the other convictions. (CT pp. 1140-1141.)

On appeal, the judgment of conviction was reversed in part and affirmed in part by the Court of Appeal for the State of California, Second Appellate District, Division Four. (Jurisdictional Statement, Appendix A.) Petitions for rehearing filed by appellant and appellee State of California were denied. (Appendix A.) The California Supreme Court denied petitions for hearing filed by both parties. The Supreme Court ordered that the opinion filed by the Court of Appeal not be published in the official reports. (Appendix B.)

STATEMENT OF FACTS [2]

Approximately July 1973, appellant met with Norman and Beverly Minnis and stated that he was starting a business, Save A Life Adoption Service, and he would like Mr. Minnis to assist him in advertising and promotional efforts. Appellant stated that his plans concerned contacting pregnant girls who did not want to keep their children through newspaper advertisements and free clinics. The girls would be offered payment of medical expenses and employment outside of the United States.

[2] Since appellant has limited the issues presented before this Court, a presentation of the facts will be similarly limited.

Following the birth of the child, the girl would return to the United States and receive the money she had earned. (RT pages 302-303, 383.) Appellant and Mr. Minnis discussed the subject of advertising the service and appellant stated that he currently had such an advertisement in the Los Angeles Free Press. Appellant directed Minnis to place an advertisement for the service and they discussed it before and after it appeared in the Los Angeles Times. (RT pages 304, 308, 385, 397A, 415.) Appellant reimbursed the Minnises for expenses incurred in connection with promoting the adoption service. (RT pages 398, 400-401, 403, 406.) They were to receive $500 each for each pregnant girl referred to the service. (RT page 37.)

In October 1973, appellant telephoned Dr. Eugene Gould, a New York resident, and stated that he had learned that he wanted to adopt a child. (RT pages 977-978, 989-900, 1009.) Appellant stated that Gould would have to be prepared to come immediately to California to pick up the child and have $10,000 ready at that time to pay for the child. Gould told appellant that he did not have that amount of money available but requested to be put on a list. Appellant replied that Gould's name could not be put on a list until Gould had the money. (RT page 979.)

On October 3 through 7, 1973, and October 30, 1973, through November 5, 1973, the following advertisement appeared in the Los Angeles Times:

"PROBLEM PREGNANCY
MAY WE HELP?
Free prenatal & medical expenses
work suitable to pregnancy avail.
Save-A-Life Adoption Services
213/631-3109 collect 24 hrs."

(People's Exhibit 6B; RT pages 251-252.)

Neither appellant nor the Save A Life Adoption Service held a license or permit from the State Department of Health to place children for adoption. (RT page 1076.)

ARGUMENT

NEITHER ON ITS FACE NOR AS APPLIED TO APPELLANT DOES CALIFORNIA CIVIL CODE SECTION 224p INFRINGE CONSTITUTIONALLY PROTECTED SPEECH

Appellant contends that California Civil Code section 224p is unconstitutional both on its face and as applied to appellant on the grounds that it infringes the freedom of speech protection contained in the First Amendment of the United States Constitution.

California Civil Code section 224p provides:

> "Any person or organization that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Health, advertises in any periodical or newspaper, by radio, or other public medium, that he or it will place children for adoption, or accept, supply, provide or obtain children for adoption, or that causes any advertisement to be published in or by any public medium soliciting, requesting, or asking for any child or children for adoption is guilty of a misdemeanor."

Appellee submits that Civil Code section 224p is part of the regulatory scheme affecting the area of adoptions. State regulation in this area is a valid exercise of the State's police power to prevent exploitation of adopting and/or natural parents by insuring that the decision to seek or provide a child for adoption is made without interference

by an unlicensed entity. Another statutory purpose is to foreclose media access to all unlicensed individuals, even those who are not operating as an organization, but who nonetheless seek to obtain or provide a child for adoption.

Statutes such as Civil Code section 224p give substance to the state's promotion of legitimate public interests. For purposes of First Amendment adjudication, the policies underlying the governmental regulation can be weighed against the asserted First Amendment claim and the specific conduct sought to be protected on the grounds of constitutional privilege. (See *Bates v. State Bar of Arizona* (1977) ____ U.S. ____ [53 L. Ed.2d 810, 823-835]; *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 761-770; *Bigelow v. Virginia* (1975) 421 U.S. 809, 818-829.)

In the present case, the constitutional challenge appellant asserts is directed against a statute which serves two distinct but related and equally important public interests. On both levels, Civil Code section 224p is incidental to legislative regulation of the "transfer of the legal status of parent and child from one parent to another." (6 Hastings L. J. 261, 298.) To effectuate that transfer, the state's regulatory system consists of state-licensed and supervised county adoption agencies, licensed and supervised private adoption agencies, and the investigative and administrative authority of the State Department of Health. Numerous statutes operate as regulations in the field of child placement. (See Civ. Code, § 221 et seq., Pen. Code, §§ 181, 273; Health & Saf. Code, § 1501 et seq.; Welf. & Inst. Code, § 16100 et seq.)

On one operative level, Civil Code section 224p reinforces the sanctions of other statutes which proscribe child placing except by licensed agencies or a natural parent. Civil Code section 224p accomplishes this

purpose by criminalizing those advertising efforts which would be a necessary adjunct to the operation of an unlawful adoption service. The unlicensed agency's contact with sources of supply and demand for children, the *sine qua non* of any adoption agency, is purposefully restrained by section 224p in order to effectuate the state's interest in overseeing the home-finding function.

On a second level, the advertising limitation of Civil Code section 224p insures that to the extent that any such informational technique is utilized, the source of the advertising will only be a state supervised licensee of the Department of Health. Neither the large scale unlicensed adoption service nor an individual parent or third party seeking placement for a specific child may employ advertisements. That a parent may independently place a child (Cal. Civ. Code, § 224q, *infra*, fn. 8), but may not advertise such placement (Cal. Civ. Code, § 224p), indicates a legislative intent to prevent the appearance of commodity-trading accompanying the legal transfer of a particular child by a biological parent.

Unlike the generalized notice of the availability of services of a licensed adoption agency, an advertisement regarding a particular child by a parent or any other person not even connected with an adoption "service" per se, would be grossly susceptible to the appearance of commodity-trading. That the Legislature intentionally sought to prevent this occurrence is evidenced by the fact that the advertising proscription against all parties except the licensed agency in California Civil Code section 224p immediately precedes Civil Code section 224q which enables a parent to independently place his or her child for adoption. Both statutes were originally written at the same time. (Stats. 1945, ch. 1317, §§ 2, 2.5, p. 2468.)

The two separate aims of section 224p combine to

promote the general public interest in the promotion of the welfare of children and the recognition of the adopting parent and child relationship created by a legal declaration of status. (*San Diego County Dept. of Public Welfare v. Superior Court*, 7 Cal.3d 1, 15 [101 Cal. Rptr. 541, 551, 496 P.2d 453, 463]; *Adoption of McDonald*, 43 Cal.2d 447, 459 [274 P.2d 860, 867]; *cf. Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 845-846.) Clearly, this interest would be greatly impaired if organizations not authorized by the State Department of Health to operate in the adoption field, were to engage in advertising as a form of merchandising and promotion of an occupational venture.

The prevention of the potentially harmful effects of such calculated solicitation is a legitimate exercise of this state's "in parens patriae" authority. *Bigelow v. Virginia, supra,* 421 U.S. 809, 825-826, fn. 10; *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376, 387-389.) Civil Code section 224p promotes the state's legitimate, comprehensive interest in the adoption function.

The specialized nature and dual purpose of the statute facilitates analysis of appellant's claim of First Amendment protection. As stated earlier, the sanction of Civil Code section 224p supports other criminal statutes in the adoption field. Section 224p proscribes advertising by any person other than a State Department of Health licensee. Participation in home-finding activities without the state license is specifically proscribed.[3] The illegality of the

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[3] At the time the advertisement was published, former California Health and Safety Code section 1310 provided in relevant part:

> "No person shall establish, conduct, or maintain in this state any facility without first obtaining a license therefor as provided in this chapter . . . . "

Former Health and Safety Code section 1250(a) provided in relevant part:

unlicensed activity is a critical factor in assessing appellant's claim.

In recent court decisions, an examination of a given advertisement in the context of the legal status of the advertised activity has proven to be determinative. In *Pittsburgh Press Co. v. Human Relations Commission, supra,* 413 U.S. 376, 389, this Court indicated that even "classic examples of commercial speech" receive some degree of First Amendment protection if the commercial proposal is legal. (*Id.*, at pp. 385-389.) Emphasizing the illegality of the advertisement there at issue, it was stated:

> " . . . any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." (*Id.*, at p. 389.)

Similarly in *Bigelow v. Virginia, supra,* 421 U.S. 809, the ruling that an abortion referral advertisement merited First Amendment protection was significantly affected by the fact that the subject matter of the advertisement referred to legal activity. This Court stated, "the place-

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> " 'Facility' means any hospital, institution, boarding home . . . homefinding agencies . . . . "

Former Health and Safety Code section 1250(d) provided:

> " 'Homefinding agencies' mean persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption." (Health & Saf. Code, § 1250, added by Stats. 1972, ch. 1148, § 3, p. 2226, and repealed by Stats. 1973, ch. 1202, § 1, p. 2564.)

ment services advertised in appellant's newspaper were legally provided in New York at that time." (*Id.*, at p. 822.)

In *Virginia Pharmacy Board v. Virginia Consumer Council, supra,* 425 U.S. 748, this Court reaffirmed that although "commercial speech" is not wholly outside the First and Fourteenth Amendments, there is a kind of purely commercial speech that lacks all First Amendment protection. This brand of speech includes that which proposes illegal activity. (*Cf. Pittsburgh Press Co. v. Human Rel. Comm'n, supra,* 413 U.S. 376.)

In the present case, the activity described and promoted in the Save A Life Adoption advertisement was simply, in effect, the solicitation of children for purposes of adoption by an unlicensed adoption service. The comprehensive system of statutory regulation devised by the Legislature provides that such proposals be advanced to the public solely by those licensed entities whose motive in placing the notice is coincident with the purpose of California adoption law generally.

The Save A Life Adoption Service was not a licensed agency. (RT page 1076.) It is clearly within this state's authority to regulate the adoption field by prescribing that conduct, such as that of appellant, is unlawful and therefore constitutionally unprotected. As applied to appellant, Civil Code section 224p does not violate the freedom of expression principle of the First Amendment.

The substantive evil addressed by Civil Code section 224p is the solicitation of sources of demand for and supply of children in a competitive adoption context. It is rationally calculated that such techniques, however indispensable to the allocation of commodities in a free enterprise system (*Bates v. State Bar of Arizona, supra,* _____ U.S. _____ [53 L. Ed.2d 810, 823]; *Va. Pharmacy Board v. Va. Consumer Council, supra,* 425 U.S.

748, 765), have no rightful place in the process of providing secure family environments for children.[4] To this end, the Legislature has provided criminal penalties for the unauthorized practice of adoption services. (See Statutes enumerated, *supra*, at p. 6) Civil Code section 224p proscribes the advertisement of such unauthorized, and therefore illegal activity, thereby bringing the statute squarely within the legitimate range of statutory power.

If the weight of the illegal activity factor is one basis for striking the First Amendment balance in favor of Civil Code section 224p, so too is the statute's second purpose: limiting resort to the media solely to state-licensed adoption services. As discussed, solicitation through the medium of advertising has a great potential for abuse because of the opportunity for wide audience dissemination available to the profiteer.[5] (*Supra*, pp. 6 - 8.)

Another threat connected with media solicitation of children or adoptive parents is more subjective but no less real. This is the threat inherent in the character of advertising as a form of product introduction. Use of advertising by private individuals, even a natural parent, to

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[4] One commentator has noted that "black market" operations are flourishing on an interstate and international scale along with a "gray market" technique involving payment of high fees to intermediaries with access to adoptable infants. (Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So.Cal. L. Rev. 10, 14-16.)

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[5] Since private adoption agencies are required by state law to operate on a nonprofit, philanthropic basis, it is reasonably concluded that avoidance of the state license requirement and attendant supervision and regulation is motivated by profit seeking. (See Cal. Admin. Code, title 22, div. 6, ch. 4, art. I, § 83003(b)(2)(4), formerly § 30743(b).)

effect a particular adoption would lead to the ineluctable comparison between the commodity-exchange methods of property ownership and the transfer of a child. Risk of this societal harm is equally deserving of the operation of the state's police power authority. As such, it is an implicit purpose of Civil Code section 224p.

Separate from the weight of the state's interest in preventing the illegal home-finding agency from flourishing, this significant second interest carries sufficient countervailing weight to overcome a First Amendment challenge. The sanction imposed by section 224p does not inhibit constitutionally protected conduct of either the unlicensed adoption service or the private person seeking specific child placement.

Appellant argues, however, that such protected conduct is deterred by Civil Code section 224p and assigns additional consitutional infirmity to the statute on the grounds of facial overbreadth and vagueness. Vague and overbroad statutes tend to deter privileged conduct because of the threat of legal sanction and to vest inordinate discretion in triers of fact who determine the application of that sanction. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-115.)

Respondent submits that an examination of Civil Code section 224p reveals no potential for the type of sweeping application which would suppress or deter protected speech. The narrow focus of the statute is directed against the specific evil of flagrant violations of adoption law promoted through advertising. In plain language, the statute prohibits the solicitation of child placement except by the licensed agency equipped with the training and investigatory tools to scrutinize and evaluate the termination and acquisition of parental rights and duties.

The proscriptive ambit of Civil Code section 224p has precisely defined boundaries. Simply put, only the organization, agency, or service permitted by law to place children for adoption may employ the medium of advertising. The statute clearly distinguishes between "conduct that may be proscribed and conduct that must be permitted." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 607.)

Thus, although appellant must base his contention of facial overbreadth on the premise that the potential rights of hypothetical third parties are violated by the statute, the vicarious aspect of appellant's argument possesses no more merit than the challenge to the law as applied to appellant. There need be no concern for a "chilling effect"[6] on protected activity of others when the standard used in defining the legality of their conduct is as precise and readily apparent as that contained in Civil Code section 224p. The licensing requirement of the statute allows for no doubt as to those parties exempted from the advertising ban and those who are not. The statute, through its explicit licensing requirement, quite clearly does not lend itself to the substantial number of unconstitutional applications which signals an overbreadth flaw.[7]

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[6] See generally, Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808-832.

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[7] See, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 859.

Appellee submits that upon balancing the relative merits of appellant's assertion of constitutionally protected activity and the valid governmental interests promoted by Civil Code section 224p, it may be concluded that no First Amendment right is infringed by its application to appellant and that the statute is neither overbroad nor impermissibly vague.

CONCLUSION

For the foregoing reasons, appellee respectfully requests that the motion to dismiss or affirm be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

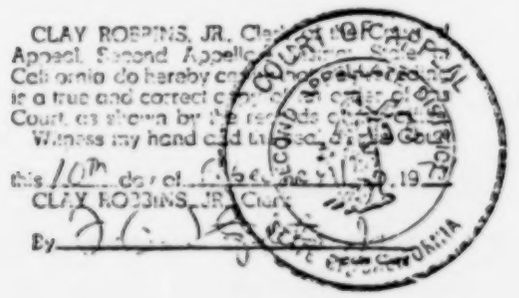
DIVISION FOUR

MINUTES OF DIVISION FOUR FOR JULY 26,1977:

2Crim. No. 28211 — PEOPLE vs. SILVERTON

THE COURT:

Petition for rehearing denied.(Appellant)
Petition for rehearing denied.(Respondent)



Appendix A

ORDER DUE
September 13, 1977

ORDER DENYING HEARING
AFTER JUDGEMENT BY THE COURT OF APPEAL

2nd District, Division 4, Crim. No. 28211
Crim. No. 30496

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE
v.
SILVERTON
- - - - - - - - - - - - - - - -
IN RE SILVERTON ON HABEAS CORPUS

SUPREME COURT
FILED
SEP 8 1977
G. E. BISHEL, Clerk
Deputy

Petitions for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled cause which was filed July 15, 1977 and appears in 71 Cal. App. 3d 790. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

GIRD
Chief Justice

Appendix B